State Bank of India *and* Local 6, International Federation of Health Professionals, ILA, AFL-CIO. Case 2-CA-17711

July 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On February 12, 1982, Administrative Law Judge Harold B. Lawrence issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed a letter-brief in support of the Administrative Law Judge's Decision, but containing, *inter alia*, a cross-exception.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions, as modified below, of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge's conclusion that Local 777 of the Banking Employees Union (herein called Local 777) failed to adhere to minimal standards of due process in ascertaining whether the employees it represented desired to merge Local 777 into Local 6, International Federation of Health Professionals, ILA, AFL-CIO (herein called Local 6), and therefore the merger attempt was invalid. In so doing, we rely on the following factors: (1) the distribution of the notice announcing the December 2, 1980,[2] meeting at which the vote on the merger agreement was to be taken was not completed until shortly before the meeting was to take place and therefore was untimely; (2) the notice of the December 2 meeting failed to announce that a vote on the merger agreement would take place; (3) the individuals attending the December 2 meeting did not have access to copies of the merger agreement; (4) no record was kept of the identity of the individuals attending the December 2 meeting; and (5) in light of all the above, the voting procedure—including the lack of a secret ballot—employed at the December 2 meeting was improper.

We do not rely on the Administrative Law Judge's conclusion that due process was lacking because the individuals attending the December 2 meeting in fact failed to adequately discuss the merger agreement and its ramifications. What is relevant in these situations is whether there was sufficient *opportunity* for discussion, rather than the actual extent and substance of the discussion. In the instant case, the fact that the notice of the meeting was inadequate rendered the opportunity for discussion insufficent. Thus, Local 777 did not adhere to minimal standards of due process because, *inter alia*, it failed to provide a sufficient opportunity for discussion and not because the individuals attending the meeting chose not to discuss the pending merger agreement.[3]

Inasmuch as the attempted merger of Local 777 into Local 6 was invalid, Respondent had no obligation to bargain with Local 6. Absent such an obligation, Respondent's refusal to bargain with Local 6 did not violate Section 8(a)(5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates herein are 1980 unless otherwise set forth.

[3] In light of the fact that Local 777's attempt to merge into Local 6 was invalid due to the lack of minimal due process, we find it unnecessary to pass on the Administrative Law Judge's discussion of whether the merger agreement was presented by Local 777 as *a fait accompli* or whether the merger, if it had in fact occurred, would have resulted in the loss of Local 777's identity.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge: This case was heard before me on September 9, 10, 11, and 17, 1981, at New York City.[1] The charge was filed on December 9, 1980, by Local 6, International Federation of Health Professionals, ILA, AFL-CIO. On January 22, 1981, a complaint and notice of hearing was issued alleging violations of Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (hereinafter referred to as the Act), by State Bank of India (hereinafter variously referred to as the Bank or Respondent), by reason of Respondent's alleged refusal to

[1] On November 17, 1981, Respondent moved to correct the official report of the proceeding, citing and correcting numerous errors in the transcript contained in pp. 9 to 887, inclusive. There being no opposition, the motion is hereby granted and the transcript is deemed corrected in accordance with the motion.

engage in collective bargaining with Local 6. The complaint alleges that Local 777 of the Banking Employees Union, certified representative of the tellers' and clerical workers' bargaining unit at the Bank's branch located at 460 Park Avenue, New York City, had been merged into Local 6, that Local 6 had thereupon demanded recognition and requested turnover of dues and other sums collected from the employees by Respondent, and that Respondent has refused to accord Local 6 recognition to which it is entitled by reason of the merger and by reason of Section 9(a) of the Act. Respondent contends that the merger should not be recognized because the employees were afforded neither adequate notice of the ratification meeting nor a suitable opportunity to consider the merger and because voting on the merger proposition was not by secret ballot.

The parties were afforded full opportunity to be heard; to call, examine, and cross-examine witnesses; and to introduce relevant evidence. Post-hearing briefs have been filed by or on behalf of the General Counsel, Respondent, and the Charging Party.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent's answer admits, and I find that Respondent is a financial institution engaged in the banking business and is organized under the laws of India and licensed to do business in the State of New York, with annual gross revenues from its operations in excess of $500,000 and that it is engaged in financial transactions in excess of $50,000 with firms located in other States than the State of New York and with enterprises located in foreign countries. Respondent denies, however, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, contending that it is exempt from the Board's jurisdiction because it is a foreign corporation substantially owned and operated by the Indian Government as an integral part of the monetary policy of the Government of India.

Respondent's answer also denies that at all material times, Local 777 of the Banking Employees Union was a labor organization within the meaning of Section 2(5) of the Act. It does not either admit or deny that Local 6 is presently or at any former time was a labor organization within the meaning of Section 2(5) of the Act.

William Perry testified that he was the president of Local 6 of the International Federation of Health Professionals, ILA, AFL-CIO, and that it is a labor organization having approximately 3,500 members, and represents white-collar and blue-collar workers, both within and outside New York State. His testimony establishes that it is a labor organization within the meaning of Section 2(5). The same is demonstrated with respect to Local 777 by the testimony of Qasi Moid, its past president, respecting its organization and by the fact that Respondent had entered into a collective-bargaining agreement with it after its certification by the NLRB on January 12, 1978. At all pertinent times, both unions had the status as labor organizations required by the Act.

Questions relating to Respondent's status as an employer within the meaning of and subject to the Act arising from its relationship to the Indian Government have already been passed upon by the National Labor Relations Board.

In *State Bank of India*, 229 NLRB 838 (1977), the Board held that Respondent was not within any of the exclusions of Section 2(2) of the Act and accordingly was within the Board's legal jurisdiction. The Board further held that it would not exercise its discretion to decline jurisdiction. The fact that Respondent is organized under the laws of a foreign country was held to be immaterial, the pertinent question being whether it was authorized to and did engage in business activities within the sovereign jurisdiction of the United States.[2]

The facts pertinent to the exercise of jurisdiction were rehashed before me for the stated purpose of preserving Respondent's legal position with respect to its pending legal contest of the Board's jurisdiction. I am bound by the Board's earlier determination that it possesses legal jurisdiction over Respondent which it ought to exercise and I find that no facts were presented before me which warrant reconsideration of the jurisdictional questions or require a different response to them than that which has already been made. The evidence in this case indicates that existing circumstances warrant a finding of continuing jurisdiction. The employees who work at the branch of the Bank located at 460 Park Avenue, New York City, include both native-born Americans and persons born in India. The latter have entered this country in conformity with the normal operations of its immigration laws. In many cases, they are here on work visas. They conform to the same hiring and discharge procedures as those to which other employees are subject. The business activities of the Bank are substantially the same as those of other banks in the New York area and include commercial business, the servicing of savings accounts and lending operations. Its operations are subject to state and Federal regulation and audit by New York State banking examiners.

Indian law does not prohibit its employees from joining unions. The Bank had tacitly conceded NLRB jurisdiction over it by its recognition of the Board's authority to conduct elections and certify the results, by entering into a collective-bargaining agreement with Local 777

[2] Accord: *S K Products Corp.*, 230 NLRB 1211 (1977). In this case, the Board commented:

> [W]e administer an Act applicable to all workingmen of our own country "in a modern world where foreign state enterprises are everyday participants in commercial activities" within this country.
>
> * * * * *
>
> There is no question that labor-management relations within a country's territorial sovereignty are generally regarded to be matters of "internal management and [internal] affairs." We are bound to ensure the enforcement of the Federal statute we administer and to afford employees in this country the freedom and rights and duties specified by that statute. By asserting jurisdiction herein, we are exercising national sovereignty in accord with generally accepted rules of international law.

after that Union was certified as its employees' representative, and even by suggesting, inconsistently with the position it takes in this case respecting jurisdiction, that Local 6 make application for a Board-supervised election.

I find that at all material times the Bank has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, has no special status as an instrumentality of the Government of India insofar as American labor laws are concerned, does not come within the exclusions provided for in Section 2(2) of the Act, and that the Board has jurisdiction over it in this case.

II. THE MERGER NEGOTIATIONS

A. *History of Local 777*

The bargaining unit in question is defined as follows:

> All full-time and regular part-time tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, keypunch operators, secretaries and Telex operators, employed by Respondent at its 460 Park Avenue, New York, New York facility, excluding all other employees, guards, and supervisors as defined in the Act.

As of December 2, 1980, there were 94 unit employees, of whom 46 were members of Local 777 and 13 were in their probationary period.[3] Qasi Moid, a lawyer of Indian origin or descent who in 1977 was an employee of the Bank, organized Local 777.[4] The Union was certified by the NLRB on January 12, 1978, following a consent election and entered into a collective-bargaining agreement with Respondent on December 6, 1978, which by its terms was to expire on September 30, 1981. Moid served as president. A clerical worker employed by the lawyers in whose suite Moid had office space for himself and Local 777 was made secretary. There were no other officers. Local 777 represented only the employees of the Bank of India at its branch at 460 Park Avenue, New York City. The Local never adopted a constitution or bylaws.

B. *Approach to Local 6*

The General Counsel's chief witness was Kunjupillai M. Viswambharan, the shop steward. Viswambharan testified that, because of the high level of employee dissatisfaction with the results achieved by Local 777, he advised Moid in November 1980 that the employees wanted a stronger union and suggested that Local 777 affiliate itself with a stronger union which could better represent the interests of the employees. Moid was busy practicing law in November 1980 and he authorized Viswambharan to contact the Union's attorney, who referred him to William Perry. Viswambharan then proceeded to open negotiations on behalf of Local 777 with Perry. Perry's union had membership of approximately 3,500, which included some bank employees in Pennsylvania, but none in New York. According to Moid, he had spoken to Perry in person and by telephone about the possibility of a merger on a number of occasions over the course of the 8-month period prior to the events at issue in this proceeding. In fact, Moid and Perry had reached an agreement in principle that a merger should take place. Viswambharan's testimony made no mention of these discussions and did not indicate any awareness on his part that they had taken place.[5]

C. *The Negotiations of November 1980*

Viswambharan, accompanied by Yohannan Scaraia, another bank employee who worked to promote the merger, met with Perry at the office of Local 6 at or about 6 p.m. on November 21, 1980. After a discussion of the employee's situation and the prospects of affiliation or merger, Perry wrote a letter to the employees, which Viswambharan himself typed and distributed to the employees at the Bank the following day. The letter stated that a meeting had taken place for the purpose of discussing affiliation of Local 777 with Local 6 and that a further meeting on the subject was to be held. There was no mention of merger. The further meeting referred to in the letter took place after working hours on November 26, 1980, this time at the office of Local 777 at 1450 Broadway, New York City. According to Viswambharan, the meeting was attended by Moid, one of the attorneys for Local 777 named Tuckman, Perry, Scaraia, and himself, and affiliation was not considered, for Viswambharan advised Moid that the employees had decided that they preferred a merger. (The mechanism by which this change of intention had been registered by the employees or precisely when they did it was never spelled out by any of the witnesses.) Viswambharan testified that Perry, Moid, and Tuckman disappeared into another room for about 20 minutes and returned with a merger agreement. Moid and Viswambharan signed it on behalf of Local 777 and Perry signed it on behalf of Local 6.

Perry's testimony placed several more people at the meeting than were mentioned by Viswambharan, including several employees of the Bank whom he did not know, an officer of Local 6 named Bob Tublin, and Mrs.

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[3] Except where the text indicates otherwise, the facts of the case as hereinafter set forth are a narrative composite of admissions contained in Respondent's answer, the undisputed and credited testimony, information contained in the exhibits, and facts stipulated by some or all of the parties.

[4] Moid first testified that he organized Local 777 as a not-for-profit corporation under New York law. Later he testified that Local 777 was already in existence when he became president, but it had no officers and he assumed the presidency at the request of the other employees.

[5] Perry's early involvement in promotion of the merger is also suggested by indications in other testimony that there had been extensive contact between Perry and those in Local 777 seeking affiliation or merger. The following remark was made by Scaraia in the course of his testimony:

> Q. When did you speak with employees, about this?
>
> A. It was before this merger agreement was signed, when we talked in the coffee room.
>
> We talked in Perry's office everyday—and he said, 777 is not good for us; we have to merger with some good union.

A further indication that Viswambharan's discussions with Perry may not have had their inception in November 1980 is the correction of the date of the meeting notice (G.C. Exh. 4) from October 26 to November 26. Viswambharan testified that he typed the notice at home on the evening of November 26, 1980, but could not convincingly explain such an error so late in the month. Some copies of the notice bearing the October date were distributed before the error was discovered.

Perry (who did not participate). He testified that the discussion got away from affiliation and became one of actual merger, and he explained to the others that merger meant the extinguishment of Local 777 after the ratification vote and turnover of its books, records, and moneys to Local 6. It thus appears that the prospects of affiliation were still under some consideration at the time the meeting started, which would have left no means of verifying the wishes of the membership if it were abandoned in favor of merger only at the meeting on November 26. In any event, according to Perry, there was some discussion back and forth and some disagreement, after which a document was worked up by the collaborative efforts of Moid, Tuckman, and Perry.

Moid's account differs from both of the preceding accounts in a number of particulars. According to Moid, Perry brought the merger agreement with him to the meeting at 1450 Broadway and they signed it without an extensive discussion. Moid requested that he be made an officer of Local 6 and was rebuffed by Perry. Moid's recollection was that the meeting took place sometime between 1 and 5 p.m.

I have highlighted the differences in the accounts of the negotiations because they had the effect of seriously diminishing Viswambharan's credibility. Viswambharan's initial testimony presented a simple situation: he mentioned the employee dissatisfaction to Moid and was authorized to pursue merger discussions with Perry, thereby instituting the chain of circumstances which culminated in the merger. However, the picture became more complex when Moid and Perry testified; it became apparent that the movement toward merger had commenced considerably earlier than Viswambharan had stated and the impetus no longer appeared to have originated with the dissatisfied employees.

The diminution of Viswambharan's credibility compelled closer scrutiny of the manner in which the transaction had been handled and required that I discount Viswambharan's version of the facts whenever credible evidence from any other source contradicted it.

III. THE MERGER AGREEMENT

The agreement sets forth that Local 6 and Local 777 desire to merge; that members of Local 777 will automatically be admitted to Local 6; that Local 6 will "as a result of this merger" represent "all present employees and future employees of Local 777"; that "all contracts and all office documentations" will be turned over to Local 6; that as of November 26, 1980, Local 777 "will not [sic] longer be in existence, and the result of this merger will be known henceforth as Local 6." The document concludes with the following provisions:

> NOW THEREFORE, in consideration of the mutual convenance [sic] herein contained, the Union LOCAL 6 and the Union LOCAL 777 agree that this memorandum is final, legal and binding.
>
> As a result of this merger, LOCAL 6 further agrees to inform the Employer, STATE BANK OF INDIA, that it is the successor of the present bargaining agreement between LOCAL 777 BANKING EMPLOYEES UNION and the STATE BANK OF INDIA.

Such language, omitting all mention of ratification by the memberships or executive boards of either union, and declaring the merger immediately effective and "final, legal and binding" as of November 26, 1980, may well have misled some of the employees into thinking that the vote on the merger merely meant approval of a *fait accompli*. This may account for the strange reaction, if it did occur, to Viswambharan's purported offer of an option to vote on the ratification by secret ballot: while I do not credit Viswambharan's testimony that at the ratification meeting he offered to conduct a secret ballot, which was noisily shouted down by the employees in attendance, it is understandable that, if they thought the matter had already been legally resolved, they would have rejected a drawn-out, pointless formality at the late hour at which the meeting was being held. The possibility that they thought they were confronted with a *fait accompli* is not obviated by the testimony of one witness that he was aware that he could vote against the merger.[6]

IV. RATIFICATION OF THE MERGER AGREEMENT

A. *The Notice of Meeting*

Immediately after the conclusion of the meeting at the office of Local 777 on November 26, 1980, Viswambharan arranged a meeting place for a ratification meeting. Then he went home and prepared a notice of meeting. It read as follows:

> NOTICE
>
> A meeting of the members of Local 777 Banking Employees Union, State Bank of India, 460 Park Ave., New York, N.Y. 10022 will be held at 5:15 P.M. on Dec. 2, 1980 at AKBAR RESTAURANT, 475 Park Ave., New York, N.Y. 10022 (Opp. State Bank of India, New York Br.) for ratification of an agreement between Local 777 Banking Employees Union and Local 6. Copy of the agreement can be obtained from the undersigned.
>
> All requested to kindly attend the meeting.
>
> (signed)
> (K.M. Viswambharan)
> Steward
> Local 777 Banking Employees Union.
>
> Oct. 26, 1980.
>
> P.S. Light Refreshment will be served.

The corrected dateline consisted of a typing of "Nov." over "Oct." Viswambharan testified that he prepared the notice on the evening of November 26 and posted copies on two bulletin boards at the Bank and distributed copies to the employees the very next day. I took judicial notice that that day was Thanksgiving Day, a day on which the Bank was concededly closed. Viswambharan

[6] Pradit Thaker.

reluctantly changed his testimony to assert that the notices were posted and distributed on the next *business* day following the merger conference with Perry. That day would have been Friday, November 28, 1980. The meeting was the following Tuesday. By his own testimony, therefore, he allowed a scant 2 business days' notice of the meeting. Such notice, if actually given, would have been grossly inadequate for an important meeting of this type. However, I do not credit his testimony respecting the posting and distribution of the notice, while it may have been started on November 28, was not completed until the afternoon of Tuesday, December 2, the very day of the meeting which it announced. The notice of the ratification meeting which the employees received must therefore be held to have been patently insufficient and untimely.[7]

Defective notice cannot be excused on the ground that no prejudice occurred; the General Counsel argues in the post-hearing brief that the large turnout by itself demonstrates the adequacy of the notice. The evidence established that 57 out of 94 persons attended; it is a matter of opinion whether that constitutes a large turnout and it is a matter of speculation whether a notice drawn differently and distributed in ample time for the employees to think about the issues and to arrange to attend the meeting might have produced a much larger turnout and a different outcome.

It is to be noted further that the subject matter of the meeting is inadequately defined in the notice. There is no intimation that a subject as important as a merger is to be considered. This abbreviated and uninformative notice deprived the employees of the freedom of choice and the opportunity to consider, discuss, and vote which the Board has held they are entitled to in the absence of a Board-sponsored election.[8] We have no way of knowing what effect the denial of that right had on the ultimate decision.

B. *Paucity of Information and Lack of Opportunity for Discussion*

The purpose of the procedural safeguards which the Board insists upon in merger situations is to ensure that the end result conforms to the informed wishes of the employees. The ascertainment of the employees' wishes is inextricably bound up with the determination of whether the employees have had adequate opportunity for discusssion and formulation of an informed opinion. In the present case, the extent of the employees' opportunity to consider the advantages and disadvantages of the proposed action and to discuss alternatives, such as affiliation or merger with a labor organization other than Local 6, or simply a change of their own Local's officers, appears to have been severely limited by the untimeliness of the notice, the manner in which it was drawn, and the manner in which the meeting was conducted and the vote taken.

No attempt was made to make data available. Instead of making some kind of systematic presentation to the employees, the moving spirits behind the merger proposition left it to the employees to learn by asking questions, a very difficult proposition because little or no pertinent data was in their possession on which questions could be based. In any event, one can only wonder what Viswambharan could have communicated to these curious employees in any premeeting discussions. He had demonstrated remarkably little concern about informing himself respecting the Union into which he wanted to merge Local 777. About all he learned was the amount of the dues. He did not know what the initials, "AFL-CIO" stood for. He had not obtained from Perry any pertinent data respecting the officers of Local 6 or of the International Longshoremen's Association, the types of employees represented by Local 6 at that time, the type of industries with which Local 6 was connected, or the internal procedures of Local 6 respecting matters such as discipline of members or their appeal rights. He never saw a copy of Local 6's constitution or bylaws. At the ratification meeting on December 2, he had to refer all questions to a representative of Local 6.

There is no evidence that on the day of the ratification meeting the employees were cognizant of the provisions of the constitution or bylaws of Local 6, of their membership responsibilities if they joined it, or of any of the significant aspects of the relationship they would have with the organization of which Local 6 was a part. They did not even have access to copies of the merger agreement. Viswambharan was not able to, or in any case did not, distribute copies of it in time to permit informed discussion of its terms.[9]

Viswambharan, in his testimony, was unable to furnish particulars of who participated in premeeting discussions of the proposed merger or what was said. There emerges from his testimony a picture of extremely informal, desultory, catch-as-catch-can snatches of conversation, mostly in the coffeeroom during coffeebreaks and at lunchtime. Though he testified that as many as 25 or 30 employees came to him to discuss the merger, he could not name more than half a dozen of them. As it was, the discussions related entirely to dues and the benefits that were expected to be obtained for the employees in the negotiations which the new Union would conduct.

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[7] Viswambharan's version of this entire episode is suspect. Viswambharan claimed he distributed copies of the merger agreement prior to December 2, but admitted that he did not complete distribution. Three bank employees, Robert T. Carpenter, Dinesh Patadia, and Ozell Brown, testified that the notice was not distributed until December 2; Ozell Brown received her copy from Viswambharan as late as 3 p.m. that day; none of them observed the notice on any bulletin board; and according to Robert T. Carpenter and Dinesh Patadia, many employees were compelled to make telephone calls home to let their families know that they would be home late, obviously not having had prior notice of the meeting. Yohannan Scaraia received his copy at 3 p.m. on Friday, November 28. Selena Griffin, Respondent's personnel officer, testified that an employee brought a copy of the notice to her on December 2, stating that it was then being distributed.

[8] *American Bridge Division, United States Steel Corporation* v. *N.L.R.B.*, 457 F.2d 660 (3d Cir 1972), denying enforcement of 189 NLRB 119 (1971), based on amendment of certification, 185 NLRB 669 (1970); *Newspapers, Inc., Publishers of the Austin American and the Austin Statesman*, 210 NLRB 8 (1974).

[9] When Scaraia received his copy of the notice, he asked Viswambharan for a copy of the merger agreement. Viswambharan promised to give it to him later, apparently not having copies with him. Scaraia testified that he did not receive it until the day before the meeting.

Scaraia's picture of the prehearing discussions was even more limited than Viswambharan's. According to Scaraia, there was no discussion on Friday, November 28, 1980, the day on which the notice was actually posted:

> Q. Did you speak with any employees, concerning this notice or concerning the topic of this notice?
>
> A. Of course, not that day, the following Monday, we talked, in the coffee room, because we are not allowed to talk about the union, during working hours; only coffee time and lunchtime, we talk about the union.
>
> I think, it was Monday, that we were talking about it.
>
> Q. Okay. So, on Monday, you said, you spoke with the employees—
>
> A. Yes, in the coffee room.
>
> Q. In the coffee room?
>
> A. On lunchtime.
>
> Q. And, at lunchtime?
>
> A. Yes.
>
> Q. Okay. How many coffee breaks, do you have during the day?
>
> A. One in the morning, for fifteen minutes; and the lunchtime, one hour, after two o'clock.

The discussion of the merger was so limited as to be inconsequential, sentiment for the merger being based on the contradictory beliefs that, on the one hand, the Bank was out to break Local 777, and, on the other hand, that Local 777 was working for the Bank instead of for the employees. Scaraia testified that the employees therefore wanted to merge with a big union:

> Q. What did you say, to employees?
>
> A. Employees said, they were willing to merge with Local 6; it is good for the employees, like I said, before, 777 wouldn't—
>
> The bank is supposed to—the union; it's best to join a good union, so they will not be able to bust . . . .
>
> We believe, the bank is about to bust the 777, or finish the union, because, it's only for the State Bank of India.
>
> And, we would like to merge with a big union; and maybe, they could do something better than 777.

The discussion which took place at the meeting itself was not any more enlightening. At the outset, it should be noted that the accounts of the meeting are studded with contradictions which undermine their reliability. Viswambharan testified at one point that he distributed copies of the merger agreement at the beginning of the meeting and at another point he testified that he read it to the group and it was reread by a representative from Local 6 because too many people did not understand what Viswambharan had read because of his heavy accent. There are also major discrepancies between his testimony and the account of the meeting set forth in a set of informal minutes prepared by him.

The minutes read in part as follows:

> 56 members were present from Local 777. During the meeting, Dr. Bob Tublin was asked by the membership questions pertaining to the merger. Dr. Bob Tublin read the merger agreement dated 11/26/80 between Local 777 and Local 6 and a debat [sic] took place for about 45 minutes. After the debat [sic] Mr. Viswambharan offered the membership a secret balot [sic] or a hand vote. Membership adopted unanimously the hand vote. Voting was taken and it was 56 in favor and non [sic] against it; not counting the representative of Local 6 and the chairman. The Local 6 officers did not participate in the final merger of the vote.

These minutes are also contradicted by the testimony of Scaraia. The 56 employees seated in the meeting were not all members of Local 777. The questions put to Tublin, an officer of Local 6, did not pertain to the merger, but dealt with the benefits which Local 6 expected to win for them in the negotiations for the new contract. Other than that, Viswambharan and Scaraia shed no light on what questions were asked. The only question about the merger which could be recalled was one about whether Local 6 would negotiate the new contract with the Bank. Nothing occurred which could be termed a "debate" as that word is normally understood in the English language.

Viswambharan testified as follows:

> Q. How did you begin the meeting?
>
> A. I introduced—
>
> Once again, I introduced the officers of Local 6; then, I circulated the merger agreement to the members; and then, I asked the membership if they had any questions, because, if they did, they could ask now, since the Local 6 officers are here and they're in the position, to explain everything.
>
> Then, the membership was asking so many questions about the benefits and what they can do for us, questions like that.
>
> I then asked Dr. Bob Tublin to answer their questions, because, most of them, I was not aware of.
>
> Bob Tublin began answering their questions for about forty five minutes; then, since nobody was asking any further questions, I asked them, now we have to—
>
> I'm sorry, then I asked Bob Tublin to read the agreement once again, because, my pronounciation, so many people could not understand.

Scaraia also testified that the discussion related to benefits and the proposed negotiating activities of Local 6. He testified that copies of the merger agreement were distributed but he said nothing about the two readings mentioned by Viswambharan:

> Q. Can you tell us, how the meeting began?

A. First, I believe, he distributed the merger agreement, to all the employees; Mr. Viswam, had distributed the merger agreement to all employees.

Q. And then, what happened? (Pause)

A. Then, he asked for everybody's agreement or disagreements; then, all the employees asked several questions, to Mr. Viswam.

What is the benefits, we are going to get in this merger; and what are they going to be doing.

Mr. Viswam, answered, you have to ask Local 6.

He asked, Mr. Bob. Viswam, asked Mr. Bob, you tell them, what kind of benefits, we are going to get.

A lot of employees, questioned, when we are going to get the pension plan, this thing, that thing; there was a lot of questions, for about forty five minutes. Specifically, what benefits, are we going to get if we merge.

Then, he explained, that we will try our best to have a decent contract; and we'll try to bargain for a decent contract.

We would get more benefits, than Local 6 [sic] are now getting.

There is no evidence in the record which establishes that either before or at the meeting there was a discussion by the employees of the ramifications of a merger of Local 777 into Local 6 or of the manner in which their relationship to their collective-bargaining representative would be affected. As noted, the process by which affiliation was ruled out and merger substituted as the proposed course of action was never elucidated.

The desire of the employees to have another union which would fight for them and win benefits for them and their loss of confidence in the ability of Local 777 to do so do not necessarily translate into a desire to merge with Local 6. Implicit in the latter case would be some knowledge respecting the matters to which I have just alluded. That the employees were so informed is not manifest in any of the evidence. The evidence shows only that on December 2, 1980, three representatives of Local 6 promised to get beneficial results for the employees in the upcoming contract negotiations with the Bank.

What is required, and what is lacking, is proof, by a preponderance of the evidence, that the vote taken is a true, considered, uncoerced expression of the employees' wishes, arrived at after appropriate deliberation.

C. *Improper Conduct of the Meeting*

Viswambharan testified to his familiarity with procedures for the proper conduct of meetings, but his expertise in that area was not apparent on the evening of December 2. No means whatever were employed to ascertain the identity of the persons attending the meeting. There was no sign-in sheet or even a list of the Local 777 membership. Viswambharan was sure that some of the persons who attended were not union members. The result is that today we have no record of the identity of the persons who attended the meeting.

Viswambharan testified that he took a head count, which at least fixes the number of persons who attended, but even on this point his testimony introduced an element of uncertainty because first he testified that he counted 56 persons present besides himself at or about 5:15 p.m., together with 3 representatives of Local 6, and later, when testifying about the balloting, he stated that he called for a show of hands in favor of the merger and, though there clearly appeared to be a unanimous vote of approval, he nevertheless proceeded with a count of the raised hands. It is not apparent why a count should have been necessary at that point.

In the question-and-answer period, at which the representatives of Local 6 answered the questions, most of the discussion appears to have centered on the terms of the contract which Local 6 hoped to negotiate for the employees rather than the pros and cons of the merger.

The vote itself was not taken in a proper manner. Because the testimony differed sharply as to what occurred when the vote was taken, it is discussed separately below. It suffices to state at this point, however, that I find that under the circumstances it would have been appropriate for the employees to vote by secret ballot instead of by a show of hands.

The manner in which the meeting was conducted and the other factors mentioned herein raise serious questions as to whether the results truly reflect the wishes of a majority of the unit employees. They may well have been denied a true opportunity to express their approval or disapproval of the merger.[10] It is in precisely such cases that the Board has refused to amend certifications and has ordered elections to resolve the issues.[11]

D. *Improper Voting Procedure*

To the previously mentioned concern that the employees regarded the merger as a *fait accompli* and the wariness which must result from the contradictory evidence regarding the manner in which the terms of the merger agreement were communicated at the meeting, must be added concern respecting a serious deficiency in the voting procedure which was employed.

Viswambharan's minutes of the meeting state that he offered the membership a choice of secret ballot or vote by show of hands and that the membership unanimously opted for vote by show of hands and unanimously approved the merger. In their testimony, Viswambharan and Scaraia repeat this version, asserting that the group noisily rejected the idea of a secret ballot.

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[10] The possibility that all the employees in the unit were not in favor of merging is raised by the following testimony of Scaraia:

Q. And after the merger agreement was signed, after you got notice of the ratification meeting, did you speak with employees?

A. Ratification meetings?

Q. Meetings, that's called for, of December 2?

A. Yes, Monday, we talked with employees, saying it was good to merge with Local 6; and most of the employees, said it was good for us.

Since memories were poor and no attendance record was made at the meeting, there is no way of knowing whether dissidents failed to attend, changed their minds, or, as Respondent in effect contends, were intimidated into going along with the merger or staying away from the meeting. There is no way to assess the effect of their nonparticipation.

[11] *Underwriters Adjusting Company*, 227 NLRB 453 (1976); *State Farm Mutual Automobile Insurance Company*, 225 NLRB 966 (1976); *Mosler Safe Company*, 210 NLRB 934 (1974).

Viswambharan testified that he counted all the hands upraised on his call for the affirmative vote; that he did not think it would have been easier to call for a "no" vote and count those; and that on the call for the affirmative vote, he could see that it was unanimous. He could not explain why he found it necessary to take an actual count of the vote when he already knew how many persons were in attendance. He rested on the assertion that the proper procedure required an actual count of the "yes" votes. This adherence to proper parliamentary procedure is noteworthy for its uniqueness, under all the circumstances, and that very uniqueness renders the explanation unsatisfactory.

The testimony of Viswambharan and Scaraia that the employees were given a choice of voting procedures is contradicted by testimony from two employees who testified at the request of Respondent, both of whom currently hold supervisory positions in the Bank, but did not hold such positions at the time of the ratification meeting.

Pradit Thaker, who at that time worked as a clerk, testified that Viswambharan called for a show of hands first from those in favor of the merger and then from those opposed to it, and never said anything about a secret ballot.

Satish Manchanda, also formerly a clerk and now a supervisor, also recalled that Viswambharan called for hand votes, first of those in favor of merger and then of those opposed to it, without saying anything about a secret ballot.

On this crucial factual issue, I must credit the testimony of Thaker and Manchanda over that of Viswambharan and Scaraia, whose testimony was substantially the same. Viswambharan's testimony is vague and obscure except with regard to certain specific key events.[12] Such portions of Viswambharan's testimony as are specific are seriously contradicted by other evidence in the record. Examples of these points, which have been analyzed separately, are his testimony as to when he actually disseminated the notice of the ratification meeting and his testimony as to the amount of discussion which took place before and at the meeting respecting pertinent aspects of the merger issue. In addition, I found unconvincing and evasive his explanations of the mistake in the date of the notice of the ratification meeting and of his reason for counting hands upon a unanimous vote though he had already taken a head count of those present at the meeting. I have also taken into consideration the fact that, as active participants in the promotion of the merger, Viswambharan and Scaraia were not in the best position to offer unqualifiedly impartial and objective testimony. Their version of the facts of this case is not supported by testimony from any other employee, though 64 employees signed a "reaffirmation" of the merger. The omission to produce testimony from any of these persons suggests that had they testified they would have given testimony favorable to the Bank's version of the events at issue.[13]

On the other hand, Thaker and Manchanda impressed me as responsible, credible persons whose credibility was not diminished by the fact that they currently occupy supervisory positions in the Bank. In fact, on numerous particulars, their testimony was consistent with other evidence in the record, including much of Viswambharan's testimony. I also note that the record is barren of evidence that any type of preparation was made to take a secret ballot if one was called for.

I therefore find that employees were not given the option of voting by secret ballot instead of by show of hands or by any alternative method.

Since Local 777 did not have a constitution or bylaws, there were no internal rules which would have governed the procedure for obtaining membership approval of a merger. Nevertheless, the requirements of due process had to be met in order to ensure a valid reading of the wishes of the employees in the bargaining unit. What occurred in this case was a fatal failure to meet basic due process requirements in a number of important respects. The notice of the ratification meeting was substantially inadequate and was not timely distributed to the employees. At the meeting, no attendance record was taken. There was no adequate consideration and discussion of the merger prior to or at the meeting. Adequate information upon which an informed decision could be made was not furnished to the employees. The employees were not afforded the opportunity to vote by secret ballot. Voting was by show of hands, though the meeting was in a public restaurant, open to observation by persons not members of the unit, in circumstances in which a secret ballot might well have been deemed more prudent. The merger agreement itself was poorly drafted and, as a result, many of the employees who attended the meeting seem to have considered the merger a *fait accompli.*

In *N.L.R.B.* v. *Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974), the court, granting enforcement of the Board's bargaining order, 200 NLRB 534 (1972), characterized the problem of passing on the validity of merger and affiliation elections (drawing no distinction between them) as involving, basically, independent analysis in each case of the factual issues:

> We point out that the Board has never laid down hard and fast rules regarding the manner in which merger elections must be conducted. In *North Electric Co., supra*, 65 LRRM at 1380, relied upon the company, all that was said was that the vote was "taken by secret ballot." This was at a meeting attended by only 55 of 238 union members. *Id.* at 1379 and fn. 4. Nowhere in that case does the Board say that this is the required procedure.

[12] The specificity of testimony is a legitimate factor that may be weighed in evaluating the relative strength and probability of conflicting versions of events. *General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Northland Maintenance)*, 248 NLRB 693, fn. 2 (1980).

[13] *General Teamsters Local 959, State of Alaska, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Northland Maintenance)*, 248 NLRB at 698; *Davis Walker Steel & Wire Corporation*, 252 NLRB 311 (1980).

> This indicates a flexible position on the part of the Board; one designed to insure that the facts of each particular case are reviewed. The Board is not locked into a rigid requirement of certain specific election procedures. Rather, the NLRB fact finder must weigh the evidence and be satisfied that the election was carried out in such a way as to reflect the majority view.[14]

In *North Electric Company*, 165 NLRB 942 (1967), cited in *Commercial Letter*, the Board set forth the principles which govern in the present case:

> In determining whether to grant a motion to amend a certification, we are guided by the general rule that such motions may not be granted when they raise a question concerning representation that can only be resolved by an election. . . . Nor do we grant amendments where the possibility of a question concerning representation remains open because the change of affiliation took place under circumstances that do not indicate that the change reflected a majority view.[15]

What is meant to be protected is the employees' free choice of a bargaining representative.[16] Thus, a finding that an action truly reflects the majority will cannot be made in the absence of a democratic election in which adequate opportunity to vote has been provided to all who are eligible to vote.[17] By failing to provide such an opportunity to the Bank's employees, the promoters of the merger have made it forever impossible to know for certain that there was adequate protection of the employees' right under Section 7 of the Act to choose their own bargaining representative and it is impossible to know whether the declared result of the voting truly reflects the majority will. Due process is the critical requirement. Though the Board has defined as important requirements protections such as proper notice, discussion, and a secret ballot,[18] it is possible to vote on a merger or an affiliation without a secret ballot if the circumstances indicate that due-process requirements are in fact substantially met so as to ensure a true ascertainment of the majority will. Thus, balloting procedures were held to be adequate even where the ballots were not secret, but were in writing and the voting was expressly found to have been free and uncoerced.[19] Balloting by a show of hands has been sustained when it has been specifically found that the employees who attended the merger ratification meeting "were given ample opportunity to express their preference as to the merger."[20] On the state of the evidence in this case, however, which clearly established the failure to inform the employees and the failure to have adequate discussion during a reasonable period of time prior to the meeting, it cannot be found that the voting was free or uncoerced, or informed or based on ample opportunity for expression of preference.

E. *Failure To Preserve Identity*

The General Counsel has failed to establish that the employer failed to engage in collective bargaining with a merged union which preserved the identity of the union which had previously been recognized as the certified representative of its employees.

The evidence in the present case clearly establishes that Local 777 was intended to disappear completely. The membership, which was less than half of the bargaining unit's membership of 94, was to be absorbed by Local 6, which at that time had approximately 3,500 members, none of whom were banking employees in New York State, and none of the officers of Local 777 were expected to continue managing its affairs.

In a somewhat analogous situation, it had been stated:

> We hold that when a local independent labor union affiliates with and becomes a local unit of an international union and transfers control over the rights of its members of the international whose constitution and by-laws make substantial changes in the rights of employees to the contract, affects their obligations to management and links their concerns with thousands of other members of the international throughout the country, a change is effected in the bargaining agent of such employees.[21]

Of course, the merger of an independent union with an international union does not necessarily mean that the interests of the members of the independent union will be submerged and neglected. The facts of each case must be looked at separately, to determine whether the situation

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[14] 496 F.2d at 42.

[15] 165 NLRB at 942.

[16] *St. Vincent's Hospital* v. *N.L.R.B.*, 621 F.2d 1054 (10th Cir. 1980), enfd. 238 NLRB 1525 (1978).

[17] *North Electric Company, supra*, fn. 6 (1967); see *William B. Tanner Company*, 212 NLRB 566 (1974), enforcement denied *Tanner Company* v. *N.L.R.B.*, 517 F.2d 982 (6th Cir. 1975), on the ground that substantial evidence on the record considered as a whole did not support the Board's finding that the successor or merged union was the authorized representative of the employees in the appropriate unit.

[18] *Underwriters Adjusting Company*, 227 NLRB 453 (1976).

[19] *Samuel P. Katz, d/b/a American Mailers (Plant #2)*, 231 NLRB 1194 (1977), enfd. 622 F.2d 242 (6th Cir. 1980), the court noting that it had not adopted continuity as a standard but that the Board, in its decision, had stated the proper standard, to wit: the employees' preference as to bargaining representative should be recognized so long as their choice has been freely made and the employer is not prejudiced.

[20] *Kentucky Power Company*, 213 NLRB 730, 732 (1974). In this case, employees' consent was not actually necessary because the international president was authorized to order a merger and determine the merger terms whenever in his opinion a merger was warranted.

[21] *Sun Oil Company of Pennsylvania* v. *N.L.R.B.*, 576 F.2d 553, 558 (3d Cir. 1978), denying enforcement of Board orders requiring recognition and bargaining, 228 NLRB 1063 (1977) and 228 NLRB 1072 (1977). In his concurring opinion in *The Hamilton Tool Company*, 190 NLRB 571, 576 (1971), Chairman Miller commented:

> Members of locals affiliated with large international unions enjoy the benefits of, and are subject to the restrictions imposed by, the constitutions, bylaws, and practice of those sophisticated and highly institutionalized nationwide organizations. They are of a quite different character from a totally local, "home-grown" and autonomous independent union. Few realists in the world of industrial relations would assert that a local of the Auto Workers or the Steelworkers is the "same union" as the autonomous predecessor independent. A Board claiming expertise in this area of social and economic life should not close its eyes to these realities.

involves continuation of the old union under a new name or a substantially different organization.[22]

A merger will not be approved where it involves the complete loss of the identity of the union which is merged. In passing upon applications for change of certification following a merger, the Board has looked to factors such as whether there was any substantial change in the operation, whether the same contracts were being administered, where they were being administered by the same personnel in the same manner as before the merger, whether the membership is the same, and whether the old officers, address, accounts, liabilities, books, cash accounts, equipment, furniture, and other properties were retained. In short, the employees must be ensured substantial continuity of organization and representation, without significant effect upon the basic identity, rights, and obligations of the group of employees, and such assurance arises from the presence of factors such as continuity of obligations owed, continuity of service to the members by the same union personnel and retention by the employees, notwithstanding their proportionate loss of voting strength, of power to exercise significant control over ratification of contracts, decision affecting their own unit, retention of officers, administration of existing contracts, and bona fide succession to the merged local's bargaining rights.[23] However, in all cases, it is of crucial importance that the change be accomplished by procedures which meet minimal standards of due process in connection with consideration of and voting upon the merger.[24]

The evidence indicates that the proposed merger of Local 777 into Local 6 would have resulted in a lack of continuity of representation. In fact, that seems to have been the very objective of some of the empoyees. The scant evidence adduced on the point indicates that the interests of the memberships were disparate. There exist none of the indications of continuity which the Board has in past cases considered to be a prerequisite of a valid merger. The lack of due process has been conclusively established.

V. FAILURE TO EFFECTUATE THE MERGER AGREEMENT

The consummation of the proposed merger would have meant the absorption as a matter of fact of Local 777 into Local 6. At the very least, this would have had to involve the turnover by Local 777 to Local 6 of its books, records, contracts, and funds; the extinguishment of Local 777 as a legal entity; and its disappearance from the scene. It has not been established by a preponderance of the evidence that any of these things have occurred. Instead, it appears that no records, documents, or funds were transferred to Local 6 and that either Local 777 or another union with a confusingly similar name, with Moid as its president, is presently operating. Though Moid testified that he left the details of Local 777's dissolution in the hands of the union's attorneys, he was unable to furnish any information about the steps taken by counsel with respect to the legal dissolution of Local 777 and no serious effort was made to obtain such information while the hearing was in progress. Respondent produced a photograph of the current office directory posted in the lobby of a building at 45 West 48th Street, New York City, which shows Local 777 on the directory. Moid asserted that this was an error resulting from the fact that he now runs a union known as Local 777B.

Perry conceded that he had never received any turnover of books, records, or contracts and he was unable to produce any copies of correspondence with Local 777 in which such turnover had been requested, though within his own union there had been executive board approval of the merger as required by its own bylaws. As of the time of the hearing, no written report had been filed with Department of Labor which reflected the fact that a merger had taken place. Verbal mention of the merger had been made in response to a departmental inquiry 6 months before the hearing.

The question of whether Local 777 continues to have a legal existence thus remains murky, with serious consequences respecting my findings as to credibility and as to the effectuation of the merger. Even if the validity of the merger were deemed to be unaffected by counsel's failure to take the steps necessary to terminate the corporate existence of Local 777 or by the failure to transfer records and assets, the omissions nevertheless cast doubt upon the vigor with which any of the due-process requirements for a valid merger were pursued and complied with and add more technical confusion to a transaction whose technical validity is already questionably on other grounds. Furthermore, in the absence of turnover of books, records, membership lists, contracts, or other documents, and the union treasury, the current legal status of Local 777 is so unclear that I must hold that, whatever the validity of the steps taken from the negotiation of the agreement through the ratification meeting, there is no evidence that a merger has in fact been effectuated.

VI. DEMAND FOR, AND REFUSAL OF, RECOGNITION; THE "REAFFIRMATION"

On December 3, 1980, Perry sent a letter addressed generally to "State Bank of India" at 460 Park Avenue, New York City, announcing the merger of Local 777 into Local 6 and demanding recognition of Local 6 as the collective-bargaining agent of the employees. The Bank responded, through counsel, that it would not recognize Local 6 as the representative of its employees and suggested that Local 6 seek an election supervised by the NLRB. According to Perry, initial telephone conversations which he had with a Bank officer gave him the impression that recognition would be accorded. There is sharply conflicting evidence respecting a telephone conversation which Perry thereafter had with the attorney who wrote the Bank's response. The evidence is utterly irreconcilable but all the testimony regarding it is in

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[22] *N.L.R.B.* v. *Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974), enfg. 200 NLRB 534 (1972); *Cocker Saw Company, Inc.*, 446 F.2d 870 (2d Cir. 1971).

[23] *Montgomery Ward & Co., Inc.*, 188 NLRB 551 (1971).

[24] *William B. Tanner Company*, 212 NLRB 566 (1974), enforcement denied 517 F.2d 982 (6th Cir. 1975). Accord: *F. W. Woolworth Company Store No. 1370*, 194 NLRB 1208 (1972); *Peco, Inc.*, 204 NLRB 1036 (1973); *U.S. Steel Corp.* v. *N.L.R.B.*, 457 F.2d 660 (3d Cir. 1972).

agreement that the demand for recognition of Local 6 was based entirely on the ground that a valid merger had taken place.

In mid-December, because of the Bank's refusal to recognize Local 6, the signatures of 64 employees were collected on an undated document under the following declaration:

> We, the undersigned, employed at State Bank of India, 460 Park Ave., New York, N.Y. 10022, reaffirm the merger agreement between Local 777 Banking Employees Union and Local 6, I.F.H.P., ILA AFL-CIO dated the November 26, 1980 and hereby designated Local 6 as our exclusive bargaining agent regarding wages and fringe benefits.

The original document was forwarded to Perry by Viswambharan. The General Counsel contended that it constituted evidence that a merger agreement had been entered into and ratified. Actually, it is hearsay as to the events which transpired in connection with the merger agreement and the events which occurred on the evening of December 2, 1980. It does not even recite which of the signatories attended that meeting. In any event, it cannot rectify the failure to observe the requirements of due process.[25]

Unquestionably, proof of employee support for a merger gathered after the effectuation of the merger can be germane to the issue of what constitutes the true desires of the employees, but such expressions, whether by way of authorization cards or willingness of employees to strike will only be considered by the Board in cases in which the true desires of the employees are ascertainable because all of the important requirements of due process, such as proper notice, adequate discussion of the issues and voting by a proper and suitable method, were complied with.[26]

[25] Significance of this document, in evidence as G.C. Exh. 6, as support for an independent charge of violation of Sec. 8(a)(5) by reason of failure to accord recognition pursuant to Sec. 9(a), is precluded by its lack of standing as a petition and by the absence of credible evidence that a copy of it had ever been sent to the employer or a demand for recognition based on it. Scaraia, who helped collect the signatures, vehemently asserted that it was a "statement" and not a "petition." Perry testified that he mailed a copy to the Bank, but could produce no evidence of such mailing nor any correspondence referring to it. The Bank officer to whom it would have come in normal course testified that he never saw it prior to the hearing. The General Counsel also limited its applicability, stating, "This document shows the support of the bargaining unit employees for a merger." That being its only relevance, it becomes meaningless in the light of the failure to prove, by a preponderance of the evidence, that a valid merger took place.

[26] *Newspapers, Inc., Publishers of the Austin American and the Austin Statesman*, 210 NLRB 8 (1974); *Samuel P. Katz d/b/a American Mailers (Plant #2)*, 231 NLRB 1194 (1977), enfd. 622 F.2d 242 (6th Cir. 1980).

VII. CONCLUSION

Assurance that the employees' wishes were properly ascertained and expressed could exist only if the requirements of due process as laid down by the Board were scrupulously observed. The evidence, however, shows that they were not complied with in a number of important respects.

As a result of these violations of due process, there exist such serious questions as to what the wishes of the employees were with respect to representation, and such an absence of credible evidence which would tend to establish what the employees thought they were doing when they raised their hands at the ratification meeting or what knowledge they had of possible alternatives, that the true significance of the uncontroverted facts that the vote taken at the meeting was unanimous and that a large number of employees signed a "reaffirmation" several weeks later, is conjectural. The resolution of these issues must abide an election.

A valid merger not having been consummated, I hold that Respondent was never at any time obligated to recognize Local 6 as the collective-bargaining representative of any of its employees, even after Local 777 abandoned its incumbency during the period of the collective-bargaining agreement due to expire September 30, 1980.

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, I make the following:

CONCLUSION OF LAW

Respondent has not engaged in the unfair labor practice alleged in the complaint herein.

Upon the basis of the foregoing findings of fact, conclusion of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[27]

The complaint herein is dismissed in its entirety.

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.